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No. 05-130

IN THE

Supreme Court of the United States

EBAY INC. AND HALF.COM, INC.,

Petitioners,

v.

MERCEXCHANGE, L.L.C.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR GENERAL ELECTRIC COMPANY, 3M COMPANY, THE PROCTER & GAMBLE COMPANY, E.I. DU PONT DE NEMOURS AND COMPANY, AND JOHNSON & JOHNSON AS AMICI CURIAE SUGGESTING AFFIRMANCE

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INTEREST OF THE AMICI[1]

The Amici herein have been at the forefront of American innovation for over 100 years. Each year they rank near the top of the annual list of United States patent recipients. They are no strangers to patent litigation: they bring suits as plaintiff patent owners, and they defend suits as accused infringers. As prominent participants in the patent world, they are well acquainted with the various circumstances that have spurred calls for change by Petitioners and their supporting amici.

With respect to "non-practicing entities," the Amici are on both sides of the aisle. The Amici sometimes market products or services that embody their patents; for other patents, they may choose never to commercialize the invention, but instead to license or sell the patent. They both enforce patents that they do not practice, and defend against plaintiffs with similar profiles. Their balanced interests make them well situated to speak to the issues before the Court.

The Amici believe that a patent holder's presumptive right to an injunction against an adjudged infringer is deeply rooted in the Constitution, the Patent Act, and 200 years of judicial precedent. The rule that injunctive relief is necessary to forestall irreparable injury to the patentee's exclusive rights reflects a historically consistent application of traditional equitable principles in cases involving unique property rights and should not be disturbed. The Amici file this brief to

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

focus on the historic and current justifications for the general rule, on which they have relied in making investments in research and development, as well as the creation and maintenance of their respective patent portfolios. The Amici urge the Court to decline the request of Petitioners and their supporting amici to use this case to effect major changes in the patent system.

Amicus General Electric Co. is one of the largest and most diversified industrial corporations in the world. Since its incorporation in 1892, GE has developed a wide variety of products for the generation and utilization of electricity. GE is a major supplier of other technologies and services in fields as varied as healthcare, homeland security, financial services, and entertainment. Total research and development expenditures at GE were $3.4 billion in 2005. GE also has a substantial patent portfolio, with over 18,000 United States patents, 1,180 of which were issued last year.

Amicus 3M Co., which began operations in 1902, is a diversified technology company with a global presence in the health care, industrial, display and graphics, consumer and office, safety, security and protection services, electronics and telecommunications, and transportation markets. Annual research and development spending at 3M exceeds $1 billion, and to protect this investment, 3M owns over 7,000 United States patents. In 2004 alone, 3M received 585 United States patents.

Amicus The Procter & Gamble Company, founded in 1837, is the largest consumer products company in the world. It markets over 300 products, including 22 brands with one billion dollars or more in sales, in 140 countries. Research and product development are central to Procter & Gamble's success as reflected by approximately $1.8 billion in annual R&D spending and over 25,000 patents throughout the world.

Amicus E.I. du Pont de Nemours and Company is a science company. Founded in 1802, it is a world leader in science and technology in a range of disciplines, including biotechnology, electronics, materials science, safety and security, and synthetic fibers. In 2005, DuPont's research and development expenditures were $1.3 billion and it was granted approximately 400 United States patents. Since 1804, when company founder E.I. du Pont was granted DuPont's first patent, DuPont has been awarded nearly 34,000 U.S. patents.

Amicus Johnson & Johnson began as a medical products business in 1886. Today, Johnson & Johnson is the world's most comprehensive and broadly based manufacturer of health care products, as well as a provider of related services, for the consumer, pharmaceutical, and medical devices and diagnostics markets. Johnson & Johnson's more than 200 operating companies employ approximately 115,600 men and women. In 2005, these companies collectively invested $6.3 billion in research and development, and they hold over 7,000 United States patents.

SUMMARY OF ARGUMENT

For 200 years federal courts applying the patent statute have routinely granted permanent injunctions against adjudged infringers. The principal goal of Amici herein is to explain why this presumptive rule is correct, is in accordance with the "principles of equity," and should not be lightly cast aside at the urgings of Petitioners and amici offering revisionist history and their views of patent policy. The injunction has long been the presumptive remedy in equity to forestall irreparable injury to the holders of unique property rights, such as patents. The policy arguments now directed at the Court should instead be (and in fact have been) directed to Congress, which has repeatedly rejected them in the past. Regardless of whether one believes that the patent system

needs to be fixed or reformed, this case surely is not the vehicle to do so.

The patent rights at issue here are rooted in Article I of the Constitution, which gives Congress the authority to "secur[e] for limited Times to ... Inventors the *exclusive* Right to their ... Discoveries" (emphasis added). Congress in turn has provided patentees with an express "right to *exclude*," which is the fundamental right conferred by a patent. It is hardly surprising, given this constitutional and statutory language, that the presumptive remedy against an adjudged infringer is a permanent injunction. That remedy is necessary to preserve a patentee's exclusive right and to avoid the only logical alternatives to an injunction: successive enforcement actions by the patentee, or a court-ordered compulsory license.

The presumption is fully consistent with 35 U.S.C. § 283, which provides that in cases of adjudged infringement the district courts "may grant injunctions in accordance with the principles of equity." Petitioners have focused on the word "may," but the proper focus is on Congress's reference to "the principles of equity." For centuries those principles have held that, absent extraordinary circumstances, the remedy against the infringer of a unique property right—be it real, personal, or patent—is an injunction. The historical exegesis offered by Petitioners and their supporting amici in support of a contrary view is seriously flawed.

The Amici, like other patent owners, have relied on the long-settled expectation that the patent grant is presumptively enforceable via a permanent injunction. They have guided their investments in research and development, and their decisions to obtain, acquire and maintain their patent portfolios, on this understanding. The Court should not undermine the value of those investments, and the incentives to continue those investments, based on Petitioners' errant historical and policy arguments.

Contrary to the argument of Petitioners and their supporting amici, the Federal Circuit did not create an "automatic" or "near automatic" injunction rule. The Federal Circuit acknowledged that its general rule has exceptions, and cited relevant equitable factors that could justify a district court in refusing to grant permanent injunctive relief. Its presumption is entirely sound—just three months ago, this Court reaffirmed the appropriateness of presumptions to guide district courts in the application of their discretion. Here, the Federal Circuit's decisions provide sufficient flexibility to permit district courts to deal with exceptional cases, and to tailor injunctions where appropriate to ameliorate hardship to public or private interests.

Because the presumption in favor of an injunction is well and deeply grounded, appeals to change it should be greeted with great caution. Petitioners and their supporting amici seek to loosen the rule so that permanent injunctions may more readily be denied, but the alternative they offer provides far too much leeway to district courts to deny injunctions based on a supposed evaluation of the worthiness of the patent holder, or theorized private harms to an adjudged infringer. These changes, if effected, would significantly undermine the basic right to exclude.

The policy arguments urged by Petitioners and their supporting amici are more suitable for Congressional rather than judicial resolution. Indeed, they have been considered repeatedly by Congress, which has consistently refused to amend the Patent Act to reduce the availability of injunctive relief in most cases. Moreover, where appropriate in view of policy concerns, Congress already has carved out limited exceptions to the strong presumption in favor of injunctive relief.

For all of these reasons, this Court should affirm the Federal Circuit.

ARGUMENT

I. PATENTS, LIKE OTHER UNIQUE PROPERTY RIGHTS, HAVE HISTORICALLY BEEN PROTECTED BY INJUNCTIONS

Petitioners' assertion that the Federal Circuit has adopted a new, "near automatic" rule in favor of injunctive relief that departs from normal equitable principles is belied by nearly two centuries of precedent. To the contrary, it is Petitioners who seek to overturn this settled precedent in favor of a new rule.

A. Patents Have Historically Been Protected By Injunctions

As others have pointed out, the rights at issue have their genesis in the Constitution, which expressly empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8 (emphasis added). Implementing that authority, Congress in the Patent Act provided:

> Every patent shall contain ... a grant to the patentee ... of the *right to exclude* others from making, using, offering for sale, or selling the invention ...

35 U.S.C. § 154(a)(1) (emphases added).

This Court has recognized for nearly two centuries that a patent conveys a right of exclusivity. See, *e.g.*, *Grant* v. *Raymond*, 31 U.S. 218, 243 (1832); *Special Equipment Co.* v. *Coe*, 324 U.S. 370, 378 (1945) ("The patent grant is not of a right to the patentee to use the invention, for that he already possesses. It is a grant of the right to exclude others from using it."). Because a patent confers an exclusive right, it is fundamentally a property right—the hallmark of which is the

right to exclude. See *Lingle* v. *Chevron USA, Inc.*, 125 S. Ct. 2074, 2082 (2005). In courts of equity, this right to exclude has historically been enforced by an injunction, preventing a continuing infringement of the patent.

Some amici supporting Petitioners claim that injunctive relief was not available in patent cases until 1819, which supposedly undercuts any argument that injunctive relief is necessary to secure this exclusive right. See Brief of American Innovators' Alliance as Amicus Curiae in Support of Petitioners at 3–4, 18–19 ("AIA Br."). But this argument is wrong as a matter of historical fact. In *Root* v. *Railway Co.*, 105 U.S. 189 (1881), this Court discussed the history of injunctive relief under the patent laws. Although the patent statute did not make an express provision for injunctions prior to 1819, federal courts nevertheless had granted patent injunctions prior to 1819 when, exercising their diversity jurisdiction, they had equitable powers. See *id.* at 192.[2] As evidence of this practice, this Court cited the 1812 decision in *Livingston* v. *van Ingen*, in which Chancellor Kent noted the English rule that "Injunctions are *always* granted to secure the enjoyment of statute privileges of which the party is in actual possession, unless the right be doubtful." 9 Johns. 507, 587 (N.Y. 1812) (emphasis added). The Chancellor continued:

> The principle is, that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed, until the opponent has fairly tried them at law, and over-thrown them. And is not this a most excellent principle ...? The

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[2] As this Court explained in *Root*, the 1819 amendment simply closed the loophole whereby injunctive relief previously was unavailable in cases lacking diversity of citizenship. See *Root*, 105 U.S. at 191–93 (citing *Sullivan* v. *Redfield*, 23 F.Cas. 357, 360 (D.N.Y. 1825)).

> federal courts in this country have thought so; *for under the patent law of congress, they have equally protected the patent by injunction.*

Livingston v. *van Ingen*, 9 Johns. at 587 (emphasis added).

This Court, as early as 1908, expressly recognized that injunctive relief is necessary to safeguard patent rights. In *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, the Court stated:

> From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of violation. *Anything but prevention takes away the privilege which the law confers upon the patentee.*

210 U.S. 405, 430 (1908) (emphasis added).

In 1969 this Court reaffirmed the same rule, stating that "[t]he heart of [the patentee's] legal monopoly is the right to *invoke the State's power to prevent others* from utilizing his discovery without his consent." *Zenith Corp.* v. *Hazeltine Research Corp.*, 395 U.S. 100, 135 (1969) (emphasis added). And in 1972 this Court referred to the right to exclude in 35 U.S.C. § 154 as "the basis for affording the patentee an injunction" under 35 U.S.C. § 283, and noted:

> As a result of these provisions the judgment of Laitrim's patent superiority *forecloses Deepsouth and its customers from any future use* (other than a use approved by Laitrim or occurring after the Laitrim patent has expired) of its deveiners throughout the United States. The patent provisions taken in conjunction with the judgment below also *entitle Laitrim to the injunction* it has received ....

Deepsouth Packing Co. v. *Laitrim Corp.*, 406 U.S. 518, 522–23 (1972) (emphases added); see also *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 197 (1980).[3]

B. Other Unique Property Rights Have Historically Been Protected By Injunctions

The federal courts' practice of regularly granting permanent injunctive relief against adjudged patent infringers is entirely in accordance with the common law "principles of equity." See 35 U.S.C. § 283. Those principles, as applied in cases involving the *deprivation of unique forms of property*, have historically resulted in the entry of injunctive relief as the presumptive remedy. This was of course true in suits involving real estate, which was presumed to be unique. Real property was subject to specific performance, and a continuing trespass was remedied by injunction. This Court recognized these general principles in *Archer* v. *Greenville Sand & Gravel Co.*, 233 U.S. 60, 63–64 (1914), in which the plaintiff sought to enjoin the defendant from dredging up sand and gravel from the river bottom adjacent to plaintiff's land. Having determined that the plaintiff owned the sand and gravel in question, this Court ruled that the question whether plaintiff was entitled "to relief in ~~equity ...~~ is easily disposed

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[3] Some of the amici supporting Petitioner cite 2 Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE 238 (Fred B. Rothman & Co. 1988) (Bigelow ed., 13th ed. 1886) ("STORY"), for the proposition that "it is not a matter of course [in patent cases] for courts of equity to interpose by way of injunction." AIA Br. at 15. In the very next sentence of this passage, however, it becomes clear that Justice Story was speaking only about preliminary injunctions "when validity has not been ascertained by a trial at law." Story went on to write that when validity *has* been established, "the court will in such a case *ordinarily interfere* by way of a preliminary injunction pending the proceeding ...." STORY at 238 (emphasis added).

of." *Id.* at 65. The Court held: "[W]e think the bill shows a continuing trespass of such nature and of such character of injury that remedies at law by actions for damages would be inadequate and would, besides, entail repeated litigation." *Id.*

The New York Court of Appeals summarized the applicable principles governing real property in *Wheelock* v. *Noonan*, 108 N.Y. 179 (1888). That court, in requiring defendant to remove stones placed on another's unoccupied lots, concluded that damages at law—even in successive actions—would be an incomplete remedy for the continuing trespass:

> The defendant ... might pay those damages, and continue his occupation, and if there were no other adequate remedy, defiantly continue such occupation, and in spite of the wrong make himself in effect a tenant who could not be dispossessed. *The wrong in every such case is a continued unlawful trespass, and any remedy which does not end or may not end it is not adequate to redress the injury* or restore the injured party to his rights.

Id. at 185 (emphasis added); see also *Garagosian* v. *Union Realty Co.*, 289 Mass. 104, 193 N.E. 726 (1935) (ordering removal of encroaching structure that extended eleven inches onto neighbor's property).

Contrary to the suggestion of Petitioners and some of their supporting amici, see Brief of Petitioners at 26–28 ("Pet. Br."), the same principles have also historically applied to personal property, provided that such property is unique. Personal property that was not fungible and could not be replaced was subject to specific performance, and its deprivation remedied by injunction. See *Elliott* v. *Jones*, 101 A. 872, 873 (Del. Ch. 1917) (endorsing specific performance of "personal property peculiar and individual in character,

such as a patent [or] heirloom"). The Supreme Court of Connecticut made this point clearly in 1867, in granting specific performance of a contract to assign a patent:

> The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and personal estate, but upon the ground that damages at law may not, in the particular case, afford a complete remedy.

Corbin v. *Tracy*, 34 Conn. 325 (1867); see also *Adams* v. *Messenger*, 147 Mass. 185, 188 (1888) (same).

Patent rights are by definition unique property. See *Elliott*, 101 A. at 873; *Corbin*, 34 Conn. at 325. They cannot be awarded except on proof of *novelty*. See 35 U.S.C. § 101 (requiring a "*new* and useful process, machine, manufacture, or composition of matter, or any *new* and useful improvement thereof"). And the patent itself provides its holder the "right to exclude." The "principles of equity," as traditionally applied in cases involving unique property, thus fully support a strong presumption that an injunction will enter against an adjudged patent infringer.

C. The Non-Patent Cases Relied Upon By Petitioners Do Not Establish A Contrary Rule

The arguments to the contrary of Petitioners and their supporting amici are not well taken. The non-patent property cases they cite for the most part concern non-unique property or mere temporary trespasses upon unique property. See Pet. Br. at 26, citing, *e.g.*, *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975) (involving shareholders "who allegedly sold at an unfairly depressed price" and would have been deprived of nothing but money). Although Petitioners do identify a handful of cases in which, after a balancing of equities, courts have declined to enter injunctive relief against a trespass on unique property, these cases generally fall within narrow,

recognizable exceptions. One case, for example, sounds in laches; it involved a "mutual mistake" under which "plaintiff knew the building" encroaching on her land "was being put on the lot by the defendant, and made no objection, not knowing where the line was." *Hunter* v. *Carroll*, 15 A. 17, 17–18 (N.H. 1888). Such cases do not detract from the force of the general rule, established by and reflected in the myriad cases cited above, that the presumptive remedy for infringement is and must be the injunction.

Petitioners also point to cases involving copyright and trademark as embodying a different rule, but they do not. The expectation with respect to both trademarks and copyrights is that, in most cases, an injunction will be entered against an adjudged infringer. See, *e.g.*, *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 196 (1985) ("A conclusion that [trademark] infringement cannot be enjoined renders meaningless the 'exclusive right' recognized by the statute"); *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 & n.10 (1994) (observing that "in the vast majority of [copyright] cases, an injunctive remedy is justified ...." (internal quotation marks and citation omitted)). The decision in *New York Times* v. *Tasini*, 533 U.S. 473 (2001), relied upon by Petitioners, see Pet. Br. at 18, simply recognized that a public interest could justify denial of an injunction—a position no different from that of the Federal Circuit below. See *id.*, 533 U.S. at 505 (infringer claiming risk to the "historical record" from an injunction).

Finally, in addressing the "principles of equity," Petitioners and their supporting amici rely heavily on three decisions by this Court that set forth general factors for federal courts to consider in addressing requests for injunctive relief. See, *e.g.*, Pet. Br. at 18–20, citing *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531 (1987); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). Indeed, Petitioners rely on the "four

factor test" as if it *alone* embodies the applicable "principles of equity"—excluding all other case law. See Pet. Br. at 17 ("Those 'principles' *are* the four factor test"). They derive from this test that district courts must always be afforded broad discretion to deny injunctions, regardless of the rights at issue. But as the history cited above demonstrates, it would be wrong to construe the term "principles of equity" as limited to the general test, thereby ignoring hundreds of years of precedent addressing the propriety of injunctions in the context of unique property rights. None of the decisions by this Court that Petitioners cite considered what protection is due the owner of a unique form of property. Instead, those cases confronted non-analogous, complex statutory schemes that themselves represented a balancing of interests. See, *e.g.*, *Amoco*, 480 U.S. at 545–46 (statute "established a framework for reconciliation, where possible, of competing public interests").

The teachings of this Court's cases and the others we have been discussing are clear: the presumptive remedy for an adjudged deprivation of unique property, such as a patent, is the permanent injunction. No better support for the presumption can be found than in a consideration of the alternatives. If a court denies an injunction after determining that the unique property right conferred by a patent is being infringed, the inexorable result would be either (1) that the plaintiff must file multiple successive lawsuits to recover damages for as long as the infringement continues, or (2) the court must somehow order payment for the future anticipated infringement—a compulsory license.

Neither result is consistent with traditional equitable principles. One of the principal purposes of a permanent injunction is to spare the prevailing plaintiff repeated trips to the courthouse. As Justice Story observed in his COMMENTARIES ON EQUITY JURISPRUDENCE:

> It is quite plain that if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.

STORY, *supra*, at 236; see also *Archer*, 233 U.S. at 63–64.

Nor is a compelled license to infringe consistent with traditional equity principles. Congress did not grant patent holders merely a right to collect license fees, and courts acting in equity have been unwilling essentially to sponsor a deprivation of the statutory right to exclude. A compelled license amounts in substance to a government condemnation of a property right, in favor of the infringer, and Congress has repeatedly refused to amend the Patent Act to provide for compulsory licensing. See *infra* at 26–27.

II. THE AMICI AND OTHER PATENT OWNERS HAVE RELIED ON THE PRESUMPTIVE RIGHT TO AN INJUNCTION

This Court has long recognized and emphasized that the patent system represents a bargain between the public and inventors: in return for public disclosure of the invention, the inventor receives the right to exclude others from practicing it for a limited period of time. See, *e.g.*, *Pfaff* v. *Wells Electronics, Inc.*, 525 U.S. 55, 63 (1998) ("[T]he patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time"); see also, *e.g.*, *Universal Oil Prods. Co.* v. *Globe Oil & Ref. Co.*, 322 U.S. 471, 484 (1944); *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, 186–187 (1933).

The Amici have built their respective patent portfolios in reliance on this bargain. To obtain each of their patents, they were required by statute to disclose to the public, upon publication of the patent application or patent, a specification detailing the exact nature and scope of the invention. See 35 U.S.C. § 112. The Amici made these detailed disclosures of the fruits of their research and development, rather than maintaining their inventions as trade secrets, based on their understanding that they would receive an enforceable right to exclude others from practicing those inventions for the term of the patent.

The patent system thus serves to encourage the public disclosure of subject matter that is a novel and nonobvious advance beyond the prior art. The right to exclude provides patentees with the economic incentive to create and disclose to the public these novel and nonobvious inventions that others can then build upon. The public loses nothing that it had prior to the patentee's disclosure if this right to exclude is enforced against an adjudged infringer. On the other hand, the incentives to invest in costly and speculative research and to disclose the results will be diminished if, by disclosure, the patentee runs the risk that others may be allowed to freely practice the invention upon payment of a court-ordered licensing fee.

Petitioners and their supporting amici suggest that reliance by inventors on the patent bargain is of little importance because patents are handed out too freely by the United States Patent and Trademark Office ("USPTO"), and are too easily enforced once granted. While we believe this ignores the realities of the patenting process in a number of significant respects, even if the situation were as dire as Petitioner and their amici contend, the appropriate remedy is not for this Court to weaken protection for intellectual property rights, but rather for appropriate resources and

management talent to be allocated to the USPTO in the first place.

Moreover, once a patent issues, the right to exclude is far from self-enforcing. Only after years of litigation, typically costing millions of dollars, does the patentee finally reach the point where it can exercise its exclusionary right via entry of a permanent injunction. During the course of the litigation the accused infringer has the right to challenge, by dispositive motion and at trial, the validity and enforceability of the patent. And during all of that time, the remaining life-span of the patent is decreasing, and, unless a preliminary injunction has been granted, the defendant remains free to infringe.

Once a defendant has been adjudged to infringe a valid patent, the patentee's right to exclude should be respected. Absent extraordinary circumstances, the infringement should stop. Forcing the patentee into a compulsory license—and thus depriving it of the legal right it obtained in exchange for investing in innovative research and then disclosing the results of that research to the public—undermines the settled expectations and enormous investments that patentees like the Amici have made in their existing patent portfolios.

III. THE DECISION BELOW PROPERLY APPLIES "THE PRINCIPLES OF EQUITY" AND SHOULD BE AFFIRMED

Contrary to the assertions of petitioners and their supporting amici, who attempt to paint the Federal Circuit's ruling in this case as "automatic" or "near automatic," see Pet. Br. at 17–18, the Federal Circuit's general rule does not unduly restrict the exercise of discretion by district courts under the Patent Act. Section 283 of the Patent Act provides that, in cases of adjudged infringement, the district courts "may grant injunctions in accordance with the principles of equity." As we have seen, because a patent is a unique species of property affording the patentee an "exclusive"

right, the application of the traditional principles of equity will almost always lead to an injunction. The Federal Circuit's general rule observes the principles of equity and comports with the statute by, in essence, employing a presumption that an injunction will follow a final judgment of infringement absent extraordinary circumstances.

Such a presumption is entirely appropriate; indeed, just three months ago this Court adopted a presumption in order to guide the application of a district court's discretion. In *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704 (2005), the Court considered a statute providing that district courts "may" award attorney's fees when a case is remanded to state court following removal. While recognizing that "'may' clearly connotes discretion," *id.* at 710 (internal quotation marks and citation omitted), the Court nonetheless cited Chief Justice Marshall for the proposition that a court's "discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Ibid.*, quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). Further observing that "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike," *Martin*, 126 S. Ct. at 710, this Court adopted a presumption that, "*[a]bsent unusual circumstances*," attorney's fees should be denied if there was an objectively reasonable basis for the removal, *id.* at 711 (emphasis added).

Moreover, the Federal Circuit's general rule recognizes exceptions in appropriate cases, a point the Federal Circuit made explicitly in this case and in numerous prior cases as well. See Pet. App. at 26a. Thus, the Federal Circuit has correctly recognized that an injunction should be denied if it

would be contrary to the public interest,[4] it has approved the denial of injunctive relief when justified by equitable doctrines such as estoppel and laches,[5] and, in a case decided shortly before the decision below, it affirmed the denial of an injunction where "the proofs required for determining future infringing activity [were] not insignificant and not amenable to a narrowly tailored order."[6]

In short, the Federal Circuit's general rule is by no means automatic. Rather, it falls squarely within the rule established by *Continental Paper Bag*, *Zenith Radio*, *Deepsouth Packing*, and *Dawson Chemical*, which in turn derives from the proper consideration of the factors commonly weighed by courts contemplating equitable relief, as we now show.

A. Irreparable Injury and the Inadequacy of Legal Remedies

Injunctive relief is "a remedy whose basis in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Rondeau*, 422 U.S. at 57; *Sampson* v. *Murray*, 415 U.S. 61, 88 (1964). As shown above, in the patent context, irreparable harm and the inadequacy of legal remedies (which are essentially the same thing) flow directly from the infringement of a valid patent, and the consequent deprivation of the right to exclude. They should be found in every case where, as here, a judgment of infringement has

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[4] See, *e.g.*, *Rite-Hite Corp.* v. *Kelley, Inc.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995); *Roche Products, Inc.* v. *Bolar Pharm. Co.*, 733 F.2d 858, 865 (Fed. Cir. 1984) (on remand, district court should consider whether injunction would have "'catastrophic effect' ... on the American public health system").

[5] *Odetics, Inc.* v. *Storage Tech. Corp.*, 185 F.3d 1259, 1273 (Fed. Cir. 1999).

[6] *Fuji Photo Film Co., Ltd.* v. *Jazz Photo Corp.*, 394 F.3d 1368, 1380 (Fed. Cir. 2005).

been entered. A compulsory royalty payment to the patent owner, allowing court-sanctioned infringement to continue, would not provide the patent owner with an adequate remedy at law. See *supra* at 7–11.

B. The Balance of Harms

The next factor in the injunctive calculus is the "balance of harms" between the patent owner and the adjudged infringer. As discussed below, this factor will rarely support the denial of injunctive relief against an adjudged patent infringer.

1. *Interests of the Infringer*

To begin, there will be few, if any, instances where the harm to an adjudged infringer will weigh heavily in the equitable calculus. First of all, the patent system reflects a Constitutional and Congressional judgment that within the limited period of exclusivity, any harm to an adjudged infringer is outweighed by the benefits the public derives from granting patentees that period of exclusivity. Decisions of the Federal Circuit limiting the factors justifying denial of injunctive relief primarily to considerations of the public interest merely acknowledge this truth.

Petitioners and their supporting amici parade before the Court a number of hypothetical horribles in which the entry of injunctive relief causes the closure of factories and loss of jobs. See, *e.g.*, Pet. Br. at 47. Petitioners enhance these hypotheticals—and they are no more than that, having no factual grounding in this case—by positing that in some industries (theirs) even diligent companies cannot uncover all the patents that might apply to their product before launching it. To the contrary, Amici—companies that operate under the very same risks—believe that proper diligence generally will uncover the relevant intellectual property of others, and they have invested substantial resources to comply with the patent

laws and respect the rights of patentees.[7] Moreover, as discussed above, a patent defendant has ample opportunity to design around a patent or negotiate a mutually-acceptable license before it ever confronts the possibility of an injunction. See *supra* at 16. Even after entry of an injunction, defendants may seek a stay of injunction pending appeal. Permanent injunctive relief should not be denied because the adjudged patent infringer failed to act on these opportunities.

Furthermore, the Patent Act already provides a means of accommodating truly extraordinary harms to a defendant, should they arise. Section 283 authorizes district courts to enter injunctions "on such terms as the court deems reasonable." District courts accordingly are able to tailor the "time, place and manner" of injunctions in order to alleviate legitimate claims of hardship. Thus, while district courts are unlikely to deny an injunction entirely, they do possess "the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht*, 321 U.S. at 329. An adjudged patent infringer might, for example, be given time in which to shift to a non-infringing position. *Shiley, Inc.* v. *Bentley Labs., Inc.*, 601 F. Supp. 964, 970 (C.D. Cal. 1985) (granting hospitals six months to transition to non-infringing blood oxygenation equipment); see also *Immersion Corp.* v. *Sony Computer Entm't Am., Inc.*, 2005 U.S. Dist. LEXIS 4777 (N.D. Cal. Jan. 10, 2005) (ordering license fee to be paid in lieu of recall of video game consoles previously sold).

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[7] *See Committee Print Regarding Patent Quality Improvement: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 12 (2005) (statement of J. Jeffrey Hawley, Legal Division Vice President and Director, Patent Legal Staff, Eastman Kodak Company, on behalf of the Intellectual Property Owners Association).

2. *Interests of the Patentee*

Turning to the interests of the patent owner, the Federal Circuit's approach in this case reflects an appropriate consideration of those interests as well. First and foremost, the patent holder has a well-established interest in, and right to, exclusive control and ownership of the invention. See *supra* at 14–15. Protecting this exclusive right must be a paramount consideration in the district court's equitable balancing.

Any departure from this general rule would have significant negative consequences. Both business leaders and inventors, especially those affiliated with public companies, desire a certain degree of legal stability and certainty, particularly when it comes to their intellectual property. Corporations including these Amici have invested in research and development, engaged in merger and acquisition transactions, and paid to acquire patent rights, all in expectation of a stable enforcement environment. Any change from the general rule that a patent right will be enforced by an injunction, to a system in which the availability of injunctive relief is left to the unguided discretion of the district courts, will undermine settled property interests and harm shareholders. It will diminish the incentive system envisioned by the Constitution as businesses elect to hold innovations as trade secrets instead of disclosing them through the patent system, or even to decrease their research and development spending. It will also increase litigation costs for patent holders and the burden of litigation on the federal judiciary as infringers will have less incentive to enter into a license prior to trial.

Petitioners and their supporting amici assert that the Federal Circuit's general rule pays too little attention to the character of the patentee. See, e.g., Petr. Br. at 32–33. That line of argument has already been rejected by this Court. See *Continental Paper Bag*, 210 U.S. at 429–30. Commercial

considerations, such as whether or not the patent owner has commercialized its invention at a particular point in time, or has offered to license its patents, have no bearing on the nature of the underlying right to exclude. Every patentee appropriately enters license negotiations with the leverage of the exclusivity that was obtained through the patentee's bargain with the public; as this Court observed in *Brulotte* v. *Thys Co.*, 379 U.S. 29, 33 (1964), "[a] patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly ...." If a non-practicing entity cannot obtain injunctive relief, the "royalties as high as [the patent-holder] can negotiate" will be based not on the "leverage of [the] monopoly," but on the would-be licensee's expectation of what a court might set as a compulsory licensee fee, discounted by the risks and costs that would be borne by the patent holder in establishing infringement.

This Court has also previously stated that "[the patent holder] may keep his invention out of use. Therefore, he necessarily has the power of granting it to some and withholding it from others, *a right of selection and terms*." *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 58 (1918) (emphasis added). Denying injunctive relief to the non-practicing entity takes from it this "right of selection and terms," which should receive no less protection than any other right secured by patent.

Finally, the law has never distinguished among the commercial interests of patent holders for purposes of awarding injunctive relief, in essence finding some more deserving of exclusive rights than others. And it is not at all clear how the "more deserving" plaintiffs would be identified. Is the supposed touchstone whether the patentee practices the patent? Or whether it purchased the patent right from another? What about corporations such as these Amici, that have portfolios containing patents they both invented and purchased, and that practice some patents but not others?

Does their ability to obtain injunctive relief vary, patent by patent? Is such an entity less deserving of its exclusive right with respect to a particular patent because, for example, it seeks to use that patent to block competitors from entering a market that is strategically important, but that the company itself has not yet, and may never, enter? The value-laden line-drawing required by a hierarchy of worthy and unworthy patent holders would simply be unworkable for courts.

C. The Public Interest

As this Court recognized a century ago in *Continental Paper Bag*, a court of equity might be justified in withholding injunctive relief "in view of the public interest." 210 U.S. at 430. The general rule applied by the Federal Circuit also recognizes a public-interest exception. See *supra* at 17–18 & n. 4.

Petitioners and their supporting amici complain that, as applied by the Federal Circuit, this public-interest exception is unnecessarily cramped, being limited only to public health emergencies. See Petr. Br. at 20. The Federal Circuit, however, has never held the exception to be so confined. While cases in which the public interest has been found sufficiently compelling happen to involve the public health, the Federal Circuit has not ruled out finding such a public interest with respect to other matters. See *Rite-Hite*, 56 F.3d at 1547–48. A case such as *City of Milwaukee* v. *Activated Sludge, Inc.*, 69 F.2d 577 (7th Cir. 1934), in which the court declined to enter an injunction against operation of an infringing sewage treatment plant, demonstrates the kind of extraordinary circumstances necessary to overcome the presumption in favor of injunctive relief; other examples might include circumstances in which injunctive relief would affect national security or public safety.

Whatever the scope of the public-interest exception previously recognized by the lower courts, this Court should

construe that exception narrowly. Notably, Congress has acted expressly where it felt that the public interest justifies an exception to the general availability of injunctive relief. The Patent Act provides that an injunction (and other relief) is not available for infringement of a medical method patent under some circumstances. See 35 U.S.C. § 287(c). And the Judiciary Act provides that injunctions are not available to bar the use or manufacture of an invention by or for the United States government. See 28 U.S.C. § 1498; *W.L. Gore & Assoc., Inc.* v. *Garlock, Inc.*, 842 F.2d 1275, 1283 (Fed. Cir. 1988). Because Congress has provided explicitly for limited public-interest exceptions, any public-interest exception under Section 283's general "principles of equity" language should be narrowly cast. See *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 697–98 (1995).

Moreover, public interest concerns, like concerns of harm to the infringer, may be addressed by the district court in entering an injunction "on such terms as the court deems reasonable." See *supra* at 20. For example, in *Shiley*, 601 F. Supp. at 970, the defendant argued that the public interest supported denying an injunction against use of its blood oxygenation equipment. The district court rejected the contention but held that the injunction would "contain a six-month transition period to allow an efficient and non-disruptive changeover for those institutions that now employ the [infringing] BOS oxygenator exclusively." *Id.* at 971.

Finally, there is no merit to the argument that the public interest frowns on awarding permanent injunctive relief to non-practicing entities. See, *e.g.*, Pet. Br. at 24–25, 39. This argument ignores the interest of the inventor who sold his or her patent rights. A rule denying injunctive relief to the purchasing company would greatly diminish the value of the patent, to the ultimate detriment of the inventor, and innovation generally.

Some amici argue more broadly that the constitutional purpose of promoting science and the useful arts is achieved only if a patented invention is being practiced.[8] But as noted above, see *supra* at 14, this Court has repeatedly recognized that the bargain implemented by the Patent Act consists of the grant of patents in return for innovation and *disclosure*, not innovation and practice. See *Crown Die & Tool Co.* v. *Nye Tool & Machine Co.*, 261 U.S. 24, 34–35 (1923) ("The benefit which the government intended to secure was not the making or use of the patent for the benefit of the public during the 17 years of the grant, except as the patentee might voluntarily confer it from motives of gain, but only the benefit of its public use after the grant expired").

In sum, the Federal Circuit is correct to recognize that the public-interest exception should be invoked only rarely. This Court need not determine the outer limits of the public-interest exception in this case, because the Petitioner presented no argument that an injunction against it negatively affected the public.

IV. PETITIONERS' POLICY ARGUMENTS SHOULD BE ADDRESSED TO CONGRESS, WHICH HAS PREVIOUSLY REJECTED THEM

In arguing against a general rule in favor of injunctive relief, Petitioners and their supporting amici rely heavily upon policy arguments. This Court, however, should resist deciding this case based on their broadsides against the Patent

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[8] The brief of the American Innovators Alliance relies upon Justice Story for the proposition that "courts of equity 'should look to whether the patentee has put the invention into public use' when considering whether to grant a patent injunction." See AIA Br. at 24, citing STORY, *supra*, at 238. Again, however, see *supra* at 8–9 & n.3, Justice Story was speaking here of preliminary injunctive relief, not a permanent injunction following trial.

Act, the Patent Office, and even the jury system.[9] As an initial matter, it simply is not the case that all the myriad faults said to be harming the system could possibly be remedied by a new standard for issuing permanent injunctions. Nor does the record *in this case* reflect the numerous supposed shortcomings in the patent system of which Petitioners and their supporting amici complain. The facts of the case do not establish, for example, that patent infringement is an unavoidable fact of life for large companies. The Amici here operate under the same rules, and they do not view infringement of others' patents as inevitable.

But more fundamentally, the broad-based policy positions of Petitioners and their supporting amici that the patent system is in need of repair should be—and have been—addressed to Congress, not the courts. See *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) ("It is for Congress to determine if the present system of design and utility patents is ineffectual in promoting the useful arts in the context of industrial design").

As an initial matter, when Congress recodified the Patent Act in 1952 it did not restrict the availability of injunctive relief under Section 283. Congress presumably accepted the judiciary's imposition of injunctions as the traditional remedy for patent infringement, including this Court's decision in *Continental Paper Bag* that injunctions should be available even for non-practicing entities. See *Commissioner of Internal Revenue* v. *Engle*, 464 U.S. 206, 224 (1984) ("We usually presume that Congress is aware of our long-standing interpretation of a statute and adopts that interpretation when it re-enacts the statute without explicit change." (internal quotation marks and citation omitted)).

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[9] See, e.g., Petr. Br. at 39–40, 48.

Moreover, Congress has the ability to amend the Act to restrict the availability of injunctive relief to address policy concerns, and has previously done so. In 1996, for example, Congress eliminated the availability of injunctions (and other relief) for infringement of medical method patents under some circumstances. See 35 U.S.C. § 287(c). Last year, however, the House Subcommittee on Courts, the Internet, and Intellectual Property circulated a committee print that would have overturned the presumption of irreparable harm in patent cases generally, but removed that provision from the bill as introduced. See *Patent Act of 2005: Hearing on H.R. 2795 Before the S. Comm. On Courts, The Internet, and Intellectual Property of the C. on the Judiciary*, 109th Cong. 5 (2005) (bill sponsor stating that "the bill replaces the [committee] print text governing injunctive relief which does not allow a court to presume the existence of irreparable harm").

In addition, Congress has repeatedly refused to amend the Patent Act to provide for compulsory licensing. In 1945 this Court recounted that "Congress was asked as early as 1877, and frequently since, to adopt a system of compulsory licensing of patents. It has failed to enact these proposals into law." *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 416 (1945). Subsequently, the Court observed that "compulsory licensing provisions were considered for possible incorporation into the 1952 revision of the patent laws," but "were dropped." *Dawson Chemical*, 448 U.S. at 215 & n.21. Congress has also declined to provide for the compulsory licensing of patents that are not being practiced. See *Special Equipment Co.*, 324 U.S. at 379 ("Congress has frequently been asked to change the policy of the statutes as interpreted by this Court by imposing a forfeiture or providing for compulsory licensing if the patent is not used within a specified time, but has not done so").

In sum, Congress has repeatedly evidenced its satisfaction with the strong presumption by which the judiciary has historically protected patent holders from irreparable harm, and has carved out only limited exceptions to this presumption. This Court should not provide Petitioners and their supporting amici the "reforms" of the Patent Act they have been denied by the legislature.

CONCLUSION

This Court should affirm the judgment of the Federal Circuit.

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